

Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
1-800-624-3270
(406) 586-4364
watercourt@mt.gov

FILED
04/20/2023
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
43B-0307-R-2022
Lambert, Kathryn
3.00

MONTANA WATER COURT, YELLOWSTONE DIVISION
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN
BASIN 43B
PRELIMINARY DECREE

CLAIMANTS: Brent A. Berg; Robin L. Berg; April Browning; Joel
D. Browning; Anthony D'Agostino; Patricia A.
D'Agostino; Ava Riccardi

CASE 43B-0307-R-2022
43B 125014-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusion of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must mail a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

Claim 43B 125014-00 appeared in the Preliminary Decree with the following remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE FILED ON THE SAME FORMERLY DECREED WATER RIGHT. THE SUM OF THE CLAIMED FLOW RATES EXCEEDS THE 200 MINER'S INCHES DECREED IN CASE NO. 11616 , PARK COUNTY. 43B 125014-00, 43B 194342-00, 43B 194390-00, 43B 194341-00, 43B 194474-00.

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT WERE FILED BY DIFFERENT PARTIES WHO CLAIM OVERLAPPING PLACES OF USE. 43B 125013-00, 43B 125014-00, 43B 125015-00, 43B 125016-00, 43B 125017-00.

As stated in the December 7, 2022 Order Consolidating Case And Setting Filing Deadline [“Order”], “[t]his claim appeared in the Preliminary Decree with a decree exceeded issue remark and a place of use/ownership overlap issue remark. The decree exceeded issue remark is erroneous and should not have been added to this claim. The place of use/ownership overlap issue remark does not require additional proceedings. Both remarks will be removed.”

In addition, the Preliminary Decree states that the ditch name is Upland Ditch but the point of diversion is for Mill Creek Flat Ditch. To address this concern, the Order includes:

ORDERED that the deadline is **February 7, 2023** for the claimants to file their written statement identifying the correct point of diversion legal description and the correct ditch name. The claimants may file a joint statement signed by everyone.

Nothing was filed.

The March 2, 2023 Order Setting Show Cause Filing Deadline states:

The Statement of Claim states that Mill Creek Flat Ditch is the ditch for this claimed right. The Preliminary Decree states that the right is diverted by Upland Ditch and the point of diversion is in the NESWNE section 3, T6S, R9E, PARK. This is the legal description for Mill Creek Flat Ditch as stated on the new marked aerial photograph prepared by the DNRC. It appears the ditch name should be changed to Mill Creek Flat Ditch. Therefore, it is

ORDERED that the deadline is **March 31, 2023** for the claimants to file a written statement showing cause why the Court should not change the ditch name from Upland Ditch to Mill Creek Flat Ditch. If not filed by March 31, 2023, the Court will conclude the claimants agree with changing the ditch name to Mill Creek Flat Ditch.

Nothing was filed. These documents are viewable in the Court’s FullCourt Enterprise case management system.

APPLICABLE LAW

“All issue remarks to claims that are not resolved through the filing of an objection as provided in 85-2-233 must be resolved as provided in this section.” Section 85-2-248(2), MCA.

A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the

elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect including for claimants objecting to their own claims. Rule 19, W.R.Adj.R.

FINDINGS OF FACT

1. The Preliminary Decree states that the ditch name is UPLAND DITCH. The ditch name should be MILL CREEK FLAT DITCH.

2. Each of the claims identified in the decree exceeded issue remark is based on one of two rights decreed to Fred Peake in Cause No. 11616, *Petrich et al. v. Allen et al.*, Sixth Judicial District, Park County. Each right is for 200 miner's inches with priority date June 4, 1963. The flow rates were erroneously totaled as for a single right, rather than separately totaled for two separate water rights. The total flow rate claimed for each Peake right does not exceed the decreed flow rate for each Peake right. The remark is erroneous and should not have been added to any of the claims listed in the remark. The remark should be removed with no additional proceedings.

3. The other remark about overlapping places of use provides notice of a possible issue. No objection was filed to address this possible issue. The remark should be removed as having served its notice purpose.

CONCLUSION OF LAW

The Statement of Claim and the new DNRC marked aerial photograph are sufficient to resolve the point of diversion legal description/ditch name issue and the decree exceeded issue remark without evidentiary hearing. Sections 85-2-248(3) and (9), MCA.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusion of Law, this Master recommends that the Court make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. A Post Decree Abstract of Water Right Claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW

Service via USPS Mail:

Brent A. Berg
Robin L. Berg
15 Packstring Trail
Livingston, MT 59047

April Browning
Joel D. Browning
PO Box 193
Pray, MT 59065

Anthony D'Agostino
Patricia A. D'Agostino
39 Adventure Ln
Livingston, MT 59047

Ava Riccardi
17 Rosemary Ln
Livingston, MT 59047

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 125014-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners:

ANTHONY M D AGOSTINO
39 ADVENTURE LN
LIVINGSTON, MT 59047 9262

PATRICIA A D AGOSTINO
39 ADVENTURE LN
LIVINGSTON, MT 59047 9262

JOEL D BROWNING
PO BOX 193
PRAY, MT 59065 0193

APRIL BROWNING
PO BOX 193
PRAY, MT 59065 0193

BRENT A BERG
15 PACKSTRING TRAIL
LIVINGSTON, MT 59047

ROBIN L BERG
15 PACKSTRING TRAIL
LIVINGSTON, MT 59047

AVA RICCARDI
17 ROSEMARY LN
LIVINGSTON, MT 59047 4008

Priority Date: JUNE 4, 1963

Type of Historical Right: DECREED

Purpose (use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 422.00 GPM

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 60.00

Source Name: MILL CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NESWNE	3	6S	9E	PARK

Period of Diversion: MAY 15 TO OCTOBER 15

Diversion Means: HEADGATE

Ditch Name: MILL CREEK FLAT DITCH

Period of Use: MAY 15 TO OCTOBER 15

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	60.00			18	5S	9E	PARK
Total:	60.00						

THE PLACE OF USE INCLUDES TRACTS 6, 8 AND 9 CERTIFICATE OF SURVEY NO.
258 , PARK COUNTY.

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

125013-00	125014-00	125015-00	125016-00	125017-00	125018-00
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